

DAVID SOHAPPY, SR., ET AL.

v.

ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS) 1/

IBIA 85-20-A

Decided April 4, 1986

Appeal from a decision of the Acting Deputy Assistant Secretary--Indian Affairs  
(Operations) concerning the use of in-lieu fishing sites on the Columbia River.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Indians: Hunting, Fishing,  
and Gathering Rights: Generally--Regulations: Generally

The Board of Indian Appeals does not have authority to change a  
duly promulgated regulation of the Department or to declare it  
invalid.

2. Indians: Hunting, Fishing, and Gathering Rights: Generally

The use of Columbia River in-lieu fishing sites for permanent  
residences or for the permanent storage of trailers and other  
personal property violates 25 CFR Part 248.

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1/ This case was originally styled as Columbia River In-Lieu Fishing Sites.

APPEARANCES: Jack L. Schwartz, Esq., Portland, Oregon, for appellants; Vernon Peterson, Jr., Esq., Office of the Solicitor, U.S. Department of the Interior, Portland, Oregon, for appellee; Gary M. Berne, Esq., Portland, Oregon, for amicus curiae, The Chiefs and Council of the Columbia River Indians. Counsel to the Board: Kathryn A. Lynn

#### OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On January 30, 1985, the Board of Indian Appeals (Board) received a notice of appeal from David Sohapp, Sr., Myra Sohapp, David Sohapp, Jr., John Jackson, Henry Alexander, David Winnier, Michael Brisbois, and Michael Hunt (appellants). Appellants sought review of a November 16, 1984, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) concerning their eviction from certain in-lieu fishing sites along the Columbia River. For the reasons discussed below, the Board affirms that decision.

#### Background

The present case is part of a larger controversy having its genesis in four treaties signed in 1855 between the United States and the Confederated Tribes of the Umatilla Reservation, 12 Stat. 945; the Yakima Nation, 12 Stat. 951; the Nez Perce Tribe, 12 Stat. 957; and the Indians of the Tribes of Middle Oregon (Confederated Tribes of the Warm Springs Reservation), 12 Stat. 963. These treaties preserve to these Pacific Northwest Indians the right to take fish at "their usual and accustomed places" and to use these places for such purposes as the "erecting of [temporary or suitable] buildings for curing" fish taken. Because these Indians historically lived and fished

along the Columbia River and its tributaries, there were numerous "usual and accustomed" fishing places along the banks of the rivers.

The construction of the Bonneville Dam, which was completed in 1937, submerged or destroyed several of the Indians' usual and accustomed fishing places. Consequently, in exchange for the peaceful relinquishment of these places, in 1945 Congress authorized the U.S. Army Corps of Engineers to acquire land along the Columbia River to replace these fishing places. See Act of March 2, 1945, 59 Stat. 10, 22, ch. 19, as amended by Act of June 8, 1955, 69 Stat. 85, ch. 131, P.L. 62. Pursuant to this authority, the United States, through the Department of the Army, acquired fee simple title to five tracts of land. Two of these sites are in Oregon, and three are in Washington State. Supervision of the sites was later transferred to the Secretary of the Interior for the benefit of those Indians from tribes having treaty fishing rights in the Columbia River. The Secretary of the Interior has delegated supervision of these sites to the Bureau of Indian Affairs (BIA), which manages them pursuant to regulations found in 25 CFR Part 248.

Title to these in-lieu fishing sites is thus held by the United States of America. Although the sites are managed for the benefit of treaty Indians, they are not Indian trust lands and are not part of any Indian reservation.

Appellants all maintain cabins or trailers at the Cook's Landing, Underwood, and Lone Pine in-lieu sites. 2/ Some of these facilities have

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2/ Appellant Michael Hunt apparently removed his trailer from the Lone Pine in-lieu site in response to a BIA trespass notice.

permanent electrical connections; others are apparently not used continuously, but are nevertheless not removed from the sites when not in use. Between March 16 and 18, 1984, each appellant was personally or constructively served with notice to terminate unlawful occupancy of Federal property, and remove abandoned personal property. Appellants were each informed they and/or their personal property were in violation of 25 CFR 248.6, 3/ which prohibits the erection, placement, or maintenance of permanent dwellings or structures on the in-lieu sites. Appellants were told to remove the unauthorized structures within 30 days or BIA would refer the matter to the United States Attorney with a request that he initiate appropriate civil court action. The notice also advised appellants that BIA would assist them in locating alternative housing. The notices were signed by the Portland Area Director, BIA.

Appellants appealed these notices to appellee. Appellee determined that appellants had not filed an adequate statement of reasons for their appeal as required by 25 CFR 2.10(a). Thus, the appeal was subject to summary dismissal under 25 CFR 2.17(a). Rather than dismissing the case, however, appellee granted appellants additional time to file a statement of reasons. Nothing was filed. Consequently, on November 16, 1984, appellee issued a decision stating at page 1: "I have concluded that the Area Director's interpretation of 25 CFR Part 248 was correct. Also, these appeals are

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3/ Section 248.6 states in pertinent part:

"No dwellings or structures shall be erected, placed, or maintained upon the sites, except that camping facilities may be placed thereon only as herein described and fish drying facilities and fishing platforms may be erected by Indians for use during the fishing season. Facilities for camping on the sites shall be limited to tents, tepees, campers, and mobile trailers. All such tents, tepees, campers, and mobile trailers shall be removed from the sites at any time the owners thereof are not actively engaged in fishing, drying fish, or processing fish by other means."

subject to summary dismissal for failure to set forth a statement of reasons for the appeals. See 25 CFR Part 2, 2.17(a)." 4/

Appellants took an appeal to the Board. On appeal briefs were filed by both appellants and appellee. In addition the Board granted amicus curiae status to and accepted a brief from the Chiefs and Council of the Columbia River Indians. Amicus is not a federally recognized Indian tribe, but states that appellants recognize it as their governing tribal organization. 5/ Amicus' brief was submitted in support of appellants' position.

#### Discussion and Conclusions

The main thrust of appellants' appeal is that the Departmental regulations in 25 CFR Part 248, governing the use of Columbia River in-lieu sites, are unconstitutional, in excess of Departmental authority, contrary to the 1855 treaties and 1945 Act authorizing the sites, and destructive of traditional Columbia River Indian culture. Secondly they argue that BIA has improperly interpreted those regulations.

[1] The Board is not the proper forum to consider appellants' main arguments. The Board does not have authority to change or declare invalid a

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4/ From this quotation of appellee's decision it is clear that he decided the appeal on the substance of the regulations in 25 CFR Part 248. Although appellee now argues that the appeal to him was dismissed for failure to provide a statement of reasons, his decision merely notes the appeals were "subject to summary dismissal;" there is no indication they were so dismissed. The Board will, therefore, treat the substance of appellants' arguments.

5/ Appellee states that most of the appellants are members of the Yakima Nation, which prohibits dual membership in another Indian tribe. Whatever the precise extent of amicus' political status, it represents an entity with which appellants identify.

duly promulgated Departmental regulation. See, e.g., Jones v. Acting Sacramento Area Director, 13 IBIA 124 (1985); Zarr v. Acting Deputy Director, Office of Indian Education Programs, 11 IBIA 174, 90 I.D. 172 (1983). Accordingly, the Board cannot consider any of appellants' arguments challenging the regulations in Part 248.

[2] Appellants also argue that those regulations have been improperly interpreted to prohibit the construction or maintenance of "permanent" residences on the in-lieu sites. The Board has carefully reviewed 25 CFR Part 248. The entire part, and particularly 25 CFR 248.6, clearly contemplates only the temporary use of the sites during the fishing season. Appellee properly determined that appellants' use of the sites for permanent residences or for the permanent storage of trailers and other personal property violated the regulations.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Deputy Assistant Secretary's November 16, 1984, decision is affirmed.

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Jerry Muskrat  
Administrative Judge

I concur:

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Bernard V. Parrette  
Alternate Member